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IN THE

Supreme Court of the United States

October Term, 1967
No. 729

SAMUEL RATNER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent

Brief for Respondent in Opposition to Petition for Writ of Certiorari

STATEMENT OF FACTS

We have set forth as an appendix to this brief a detailed statement of facts supporting the judgment, with specific transcript references. In order, however, to aid this Court in understanding the evidence and contentions of the parties, we have prepared below a summary of this detailed statement of facts insofar as the evidence would be relevant to the issues presented by the petitioner for writ of certiorari.

The Petitioner ran a mail-order business in which he purchased mailing lists and indiscriminately sent out advertising brochures to persons on the lists (Rep. Tr. p. 217.)[1] The result of such indiscriminate mailing

[1] "Rep. Tr." is an abbreviation for the reporter's transcript of the evidence presented in the tiral court. The reporter's

(This footnote is continued on the next page)

led to the sending of an advertising brochure to a woman named Mrs. Whaley, whose name may have been obtained through the subscriber lists of *Playboy* magazine. (Rep. Tr. pp. 7, 14, 15.) Mrs. Whaley had never ordered nor solicited any of the materials offered by the defendant Ratner. (Rep. Tr. p. 14.) As a result of a report registered by Mrs. Whaley's husband, the matter was investigated by a police agency. (Rep. Tr. p. 6.)

Count III of the complaint was based upon the advertising brochure sent to Mrs. Whaley which offered for sale among other items, a book entitled "Bondage Cabin" and a movie entitled "The Court." (See People's Exhibit 2.) The book and the movie were the bases of Counts I and II of the complaint, respectively. The advertising brochure which offered these two materials was sent to at least 50,000 people and its purpose was to act as a "scam." (Rep. Tr. pp. 206, 222, 224.) A scam, as explained by the defendant himself, was designed to be deemed an offering of hard-core pornography, since the people who receiving the mailing would feel that no one would sell anything that was not hard-core pornography for the price that was quoted. (Rep. Tr. pp. 208, 209, 225.) The petitioner stated that there were people who would enjoy the type of thing such as the book, "Bondage Cabin." (Rep. Tr. pp. 211, 213.)

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transcript is in the custody of the Clerk of the Appellate Department of the Superior Court for the County of Los Angeles, at the Los Angeles County Courthouse, 111 N. Hill Street, Los Angeles, California 90012. The exhibits which were introduced in the trial court are in the custody of the Clerk of the Municipal Court of the El Monte Judicial District, County of Los Angeles, 11301 East Valley Boulevard, El Monte, California 91231.

Dr. Crahan, a physician who was the People's witness, and was on a psychiatric panel of the California Department of Mental Hygiene and the Los Angeles Superior Court, testified that "Bondage Cabin" and "The Count" would excite abnormal emotions and appeal to the prurient interest of abnormal people such as masochists or sadists. (Rep. Tr. pp. 274, 277.) Dr. Polos, a psychiatrist who testified for the defense, testified that "Bondage Cabin" would appeal sexually to mentally ill persons, such as a sadist or a masochist. (Rep. Tr. p. 327.) They both testified that neither the book nor the film had redeeming social value. (Rep. Tr. pp. 292, 325, 326.) Dr. Crahan specifically testified that books such as "Bondage Cabin" and films such as "The Count" would have a tendency to cause a person who was a deviate to take some overt action in regard to his deviation. (Rep. Tr. p. 278.) Material of this type would excite the pattern of the deviate by removing some inhibitions that would hold his deviation under control. (Rep. Tr. p. 278.)

In addition, the jury, upon the evidence presented to them, could properly have inferred that petitioner specifically conceived and marketed his materials for such sexually deviant groups, since petitioner himself participated in the preparation of some of these materials, participated in the preparation of advertising matter designed to appeal to deviant groups, and was aware of the fact that there were people of this kind who enjoyed this type of thing, and to whom he offered the material he promoted. (Rep. Tr. pp. 153, 154, 158, 212, 213.)

ARGUMENT

I

IN REGARD TO COUNTS I AND II OF THE COMPLAINT, CERTIORARI SHOULD BE DENIED BECAUSE THE MATERIAL IN QUESTION CONSTITUTES HARD-CORE PORNOGRAPHY

It is clear from the evidence that the appeal of the book "Bondage Cabin" and the movie "The Count" must be judged in terms of their effect upon those groups of persons who formed the deviant sexual groups known as masochists and sadists. These two deviant sexual groups are two of the "prominent types" recognized in the reference work referred to by this Court in *Mishkin v. New York,* 383 U.S. 502, 509, fn. 8, 86 S.Ct. 958, 964, fn. 8, 16 L.Ed.2d 56, 62, fn. 8 (1966) and, as was done in *Mishkin,* are two of the groups as to whom the appeal of this type of material can be assessed in light of the sexual interests of these intended and probable recipient groups. Judged by its appeal to those deviant groups, and when compared to the material in *Mishkin v. New York,* the evidence in this case supports a judicial finding that the book and the movie, independent of any pandering aspects of this case, constitute hard-core pornography and are not protected by the First Amendment.

II

IN REGARD TO COUNTS I AND II OF THE COMPLAINT, CERTIORARI SHOULD BE DENIED BECAUSE, ASSUMING, WITHOUT CONCEDING, THAT THIS IS A CLOSE CASE, EVIDENCE OF PANDERING REQUIRES A FINDING THAT THE MATERIALS IN QUESTION ARE OBSCENE

As noted in Part I of our Argument, we contend that the materials in question are hard-core pornography on their face in light of the evidence presented at the trial. Assuming, without conceding, that if this Court were to conclude that the materials were not hard-core pornography, there is sufficient evidence of pandering to justify a finding that the materials in question are obscene. Such evidence of pandering may, in a close case, "be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." (*Ginzburg v. United States,* 383 U.S. 463, 474, 86 S.Ct. 942, 949, 16 L.Ed.2d 31, 40 [1966].)

As stated in *Ginzburg,* 383 U.S. at 475-476; 86 S.Ct. at 950; 16 L.Ed.2d at 41:

> "Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."

In the instant case there is substantial evidence of defendant's "pandering" and emphasis solely on the sexually provocative aspects of his books and films. The advertising brochure; the role of such brochures as scams, as expressly stated by the petitioner; the books which are Exhibits 15 to 20; and the photographs (Exhibits 21 to 23), in addition to the book and film in question, constitute evidence of such emphasis. Under the *Ginzburg* case, *supra,* the material can be viewed against this background of commercial exploitation of erotica solely for the sake of their prurient appeal.[2]

Viewed against this background one can only conclude that material constitutes hard-core pornography, which is the exact conclusion that petitioner himself desired the public to draw.

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[2]It should be noted that the California Supreme Court recently indicated that the concept of pandering is not part of the California statutory scheme. See *People v. Noroff,* 67 A.C. 814, 816 (1967). Such a conclusion does not prevent this Court from deciding that under federal constitutional standards as established by this Court in Ginzburg, the matter is obscene even though such standards are not the basis upon which the state courts would draw this conclusion. See *Cooper v. California,* 386 U.S. 58, 61, 87 S.Ct. 788, 790, 17 L.Ed.2d 730, 733 (1967).

III

IN REGARD TO COUNT III OF THE COMPLAINT, CERTIORARI SHOULD BE DENIED SINCE THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THE PETITION

Count III of the complaint charges a violation of California Penal Code, section 311.5 and is therefore distinguishable from Counts I and II of the complaint which charges violations of California Penal Code, section 311.2. The latter section is based upon the dissemination of obscene matter, whereas the former section is based upon the dissemination of advertising which purports to hold out matter as obscene. The petition herein does not attack the constitutionality of, nor the construction placed by the California courts upon California Penal Code, section 311.5. The constitutionality of that section was upheld in *Kirby v. Municipal Court,* 237 Cal.App.2d 335 (1965). The construction to be placed upon that section of the Penal Code was announced in *People v. Tierney,* CR A 6922 (1967) (a decision of the Appellate Department of the Superior of the State of California for the County of Los Angeles), wherein the court stated:

> "There is no issue in this case whether any material is obscene. *Thus the constitutional issue present in obscenity cases, upon which the trial judge may make an independent ruling, is absent here.* Instead the issue is whether the material is 'held out . . . to be obscene.' Section 311.5 Penal Code. This issue of fact should be decided by the jury under proper instructions defining obscenity." (Emphasis added.)

This interpretation of California Penal Code, section 311.5 in *People v. Tierney* was relied upon in the instant case since in the "Order Certifying Cause to Court of Appeal" made by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles in the instant case, the Appellate Department stated:

> "By this court's judgment entered June 8, 1967, affirming without opposition the judgment of conviction on all three counts charged, we held . . . on Count III that the materials advertised need not in fact be obscene as long as they are represented or held out to be obscene, following this court's holding in *People v. Tierney* (1967), CR. A. 6922." (Petition, Appendix A, pp. 2-3.)

Based upon the authorities in California, as noted above, it is clear that the issue in a case charging a violation of California Penal Code, section 311.5 (as distinguished from a violation of California Penal Code section 311.2) is not whether the material disseminated is obscene, but rather what did the defendant intend a reasonable man to conclude that he, the defendant, was offering to the average recipient of the advertisement. In other words, it is necessary for the trier of fact to determine what a reasonable man would believe the effect of the advertisement would be upon the average recipient of the advertisement, *i.e.* what interpretation would the average recipient place upon the advertisement. This issue poses a problem of intent rather than content, and is more similar to the

factual type of issues customarily submitted to the jury than to the "constitutional fact" issues which must eventually be decided in obscenity cases. Of course, in making this determination the jury must consider the definition of obscenity in determining whether or not the reasonable man could infer that the advertisement offered obscene matter. However, the mere fact that the jury must be instructed as to the definition of obscenity (see opinion in *People v. Tierney,* quoted above) does not make this issue a matter for constitutional adjudication under the First Amendment.

Having thus seen that petitioner makes no attack upon California's interpretation of Penal Code, section 311.5, it is clear that his request for certiorari as to Count III does not present constitutional issues under the First Amendment. Petitioner's argument regarding the sufficiency of evidence as to Count III must be relegated to a violation of the Fourteenth Amendment, based on the contention that there is no evidence whatsoever supporting the judgment. (See *Thompson v. City of Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L. Ed.2d 654 [1960].)

We contend that the evidence adequately supports an inference that the advertising brochure which is the subject matter of Count III of the complaint, on its face and in accord with the purpose for which petitioner sought it to be used (as a "scam"), represented and held out that the items offered for sale were obscene.

CONCLUSION

This Court recently has reversed a number of decisions on the basis of *Redrup v. New York,* 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). If this Court believes that there is any merit in the instant petition for writ of certiorari (and we contend there is none whatsoever), then this case should not be disposed of in as summary a fashion since, as distinguished from *Redrup* and its progeny, there was substantial evidence of pandering and of an assault upon individual privacy by dissemination in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to petitioner's advertisements. Furthermore, the material itself is so comparable to that passed upon by this Court in *Mishkin v. New York,* 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966), that if there is to be any difference in result, the states should be offered some guidelines so that they can properly apply the constitutional distinctions found by this Court.

Recently Justice Black wrote that no one, including the members of this Court, can possibly know what is or is not obscene or libelous under its decisions. (See *Curtis Publishing Co. v. Butts,* 388 U.S. 130, at 171; 87 S.Ct. 1975, at 2000; 18 L.Ed.2d 1094, at 1120-1121 (1967). In this case the prosecution followed to the best of its ability the concepts established by *Mishkin* and *Ginzburg.* If the Court reaches a different conclusion on this petition it is respectfully

urged that clear guildelines should be established to assist those who earnestly attempt to follow constitutional mandate in this most difficult area.

For the reasons set forth above, the petition for writ of certiorari should be denied.

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